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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

ELAINE T. YAFFE,

Plaintiff,

v.

EDDIE MENDELSON et al.,

Defendants and Respondents;

KRANE & SMITH et al.,

Objectors and Appellants.

B209926

(Los Angeles County  
Super. Ct. No. BC367750)

APPEAL from order of the Superior Court of Los Angeles County. Elizabeth Allen White, Judge. Reversed.

Krane & Smith, Marc Smith, Ann Penners Bergen and Mark E. Goodfriend for Objectors and Appellants.

Curry & Associates and K. Todd Curry for Defendants and Respondents.

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Marc Smith and Krane & Smith, counsel for Elaine T. Yaffe, appeal from the trial court's award of \$6,000 in monetary sanctions against them in connection with a third-party subpoena they issued to the accountant of Eddie Mendelsohn and San Diego Pallets, Inc. We reverse the sanctions order.

### **BACKGROUND**

Yaffe's lawsuit against Aaron Mendelsohn and Michael J. Goldberg (Respondents) was scheduled to go to trial on February 26, 2008. On February 4, Yaffe's counsel, Marc Smith of Krane & Smith (hereinafter collectively Smith) issued a third-party trial subpoena to Ilona Neumann, a certified public accountant. The subpoena required Neumann to attend the trial and to bring with her the following documents: federal and state tax returns, supporting documentation, and work records related to San Diego Pallets, Inc. (SDP), a closely held corporation owned by Eddie Mendelsohn; and all documents of Eddie Mendelsohn, including personal and bank records, tax returns, and financial statement work papers.

Eddie Mendelsohn and SDP were not parties to Yaffe's suit against Aaron Mendelsohn and Goldberg. Yaffe had unsuccessfully attempted to obtain the same documents during discovery, in connection with Yaffe's deposition of Eddie Mendelsohn in November 2007.

Smith served the subpoena on Neumann on February 7, 2008. He did not serve a copy on, or otherwise notify, Eddie Mendelsohn or SDP.

Eddie Mendelsohn's counsel, K. Todd Curry, wrote Smith on February 15, 2008, objecting to the production of the documents required by the subpoena unless Smith prevailed on a motion to compel. Curry objected that the subpoena was overbroad, that the information it requested was protected by Eddie Mendelsohn's and SDP's right to privacy, and that the subpoena of Neumann was void because Smith did not serve copies on Eddie Mendelsohn as required by Code of Civil Procedure section 1985.3.

Neumann's counsel, after talking with Smith, advised Neumann that the subpoena required her to attend the trial on February 29, 2008 and to bring with her the subpoenaed

documents. Smith's office wrote Neumann on February 19 that if she did not execute an on-call agreement or did not appear at trial the court would issue a bench warrant for her arrest. Curry, on behalf of Eddie Mendelsohn, continued to object in writing to the production of the documents.

Neumann arrived at 9:30 a.m. on February 29, the date of trial, with two boxes of documents. Traveling from San Diego to Los Angeles, Curry also attended the trial on the 29th, and submitted a memorandum to the court asserting the statutory privilege of nondisclosure of income tax statements, arguing that the subpoena was void and requesting the court to order monetary sanctions against Yaffe and Smith. The trial court ruled that the subpoena issued without notice to consumer (Eddie Mendelsohn and SDP) was invalid, and that the documents subject to the subpoena were not to be used at trial. Smith then withdrew the subpoena and excused Neumann from further attendance at the trial. The court told Curry to bring a motion for sanctions. Smith told Neumann at around 1:30 p.m. that she was free to go.

Eddie Mendelsohn and SDP later filed a motion for monetary sanctions, arguing "There is no excuse or justification whatsoever for having forced Movants to intervene in the trial of this action, particularly when Mr. Smith knew all along (and otherwise was informed early on) that he had not followed the most basic of mandatory procedures under the Code and that the tax return privilege protected the documents he sought." The motion requested attorney's fees and costs of \$8,702.50 (\$6,342.50 for responding to the subpoena and \$2,360 for filing the motion for sanctions).

After a hearing on May 13, 2008, the court granted the motion and awarded \$6,000 in sanctions against "Krane and Smith and Marc Smith," finding "Marc Smith issued and served a trial subpoena (including a demand for documents) to and on CPA Ilona Neumann ("Neumann") who is the accountant for Eddie Mendelso[h]n and SDP, and that the provisions of Code of Civil Procedure section 1985.3 were triggered; the Court finding that Marc Smith did not issue a notice to consumer, nor did he serve a notice to consumer on Neumann, Eddie Mendelsohn, or SDP (which is a Subchapter S

corporation), nor did he serve the subpoena on Eddie Mendelsohn or SDP (or on their counsel, of whom Marc Smith was aware), all as required by Code of Civil Procedure section 1985.3(b), (e); the Court finding that Marc Smith failed and refused to withdraw the subpoena despite being informed that he had not complied with applicable procedures and despite being informed that the subpoena sought documents that otherwise appeared to be privileged; the Court exercising its discretion pursuant to code of Civil Procedure section 1987.2 and/or Code of Civil Procedure section 2023.020 and finding that an award of reasonable expenses (including attorneys' fees) incurred by Movants is appropriate . . . .”

Smith appeals from the order awarding sanctions.<sup>1</sup>

### **DISCUSSION**

We review the order imposing sanctions for an abuse of discretion, which “occurs if, in light of the applicable law and considering all of the relevant circumstances, the court’s decision exceeds the bounds of reason and results in a miscarriage of justice.” (*New Albertsons, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1403, 1422.) “The abuse of discretion standard affords considerable deference to the trial court, provided that the court acted in accordance with the governing rules of law.” (*Ibid.*) “A decision ‘that transgresses the confines of the applicable principles of law is outside the scope of discretion’ and is an abuse of discretion.” (*Ibid.*)

Code of Civil Procedure section 1985.3, subdivision (b)(1)<sup>2</sup> provides that when a subpoena seeks the personal records of a consumer (including documents maintained by an accountant), the subpoenaing party must personally serve notice of the subpoena on the consumer whose records are being sought. If a nonparty consumer whose records are subpoenaed does not want to produce the subpoenaed records, the nonparty may serve on

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<sup>1</sup> An order “directing payment of monetary sanctions by a party or an attorney” is appealable if it exceeds \$5,000. (Code Civ. Proc., § 904.1, subd. (a)(12).)

<sup>2</sup> All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

the subpoenaing party an objection citing specific grounds for refusing to produce the documents sought; once the nonparty makes a written objection to the request, the subpoenaed individual is not required to produce the records unless the court makes an order requiring production. (§ 1985.3, subd. (g).) The witness may also refuse to produce the consumer's documents on the basis that the party issuing the subpoena failed to comply with any of the requirements of section 1985.3. (§ 1985.3, subd. (k).)

Curry followed the procedures outlined in section 1985.3, subdivision (g) for a nonparty consumer to object to a subpoena. Smith did not comply with the statutory requirement of notice to the consumer, because he did not serve a copy of the subpoena on or in any way notify Eddie Mendelsohn or SDP. Curry objected on behalf of his nonparty clients, specifically noting that Smith had failed to comply with section 1985.3, subdivision (b)(1), because Smith did not serve Mendelsohn or SDP with the consumer notice required by section 1985.3, subdivision (b)(1). Further, even after Curry had objected in writing and pointed out the violations of the statute and up to and during the first day of trial, Smith continued to assert that the subpoena required Neumann to come to the trial and bring the documents, under threat of a bench warrant for her arrest. Neumann brought two boxes of documents to the first day of trial, and Curry traveled from San Diego and asserted the tax papers privilege before the trial court.

The trial court concluded that these actions justified the imposition of sanctions, observing that Smith never at any time advised Neumann she did not need to bring the documents. Neumann had appeared to protect her rights as well as the rights of Eddie Mendelsohn and SDP, just as Curry had had to travel to the trial to protect their rights, in the absence of any indication from Smith that he was withdrawing the subpoena. In granting the motion and awarding sanctions, the court stated: "You not only subpoenaed her to appear personally, but you subpoenaed her to produce documents which were protected by a privilege. At no time did you indicate she did not need to produce the documents. At no time did you indicate to her her appearance would not be required, and

apparently her appearance was not required. So clearly she was here just for the documents.”

We agree with the trial court’s disapproval of Smith’s actions. Smith issued a defective subpoena, and even after repeated written objections pointing out that he had not complied with the statute’s requirement of notice to the consumer, he continued to maintain that the subpoena was valid, and even threatened Neumann with a bench warrant if she did not appear with the documents. As a result, Neumann appeared with two boxes of records on the first day of trial, and Curry traveled to court from San Diego to file a written memorandum and argue that the documents were privileged. Only after the trial court heard argument and concluded that the documents were not to be used at trial did Smith withdraw the invalid subpoena. Nevertheless, we cannot affirm the award of sanctions, because the statutes cited by the court did not give it authority to impose monetary sanctions under these circumstances.

The court cited section 1987.2, which provides: “in making an order pursuant to *motion* made under subdivision (c) of Section 1987 or under Section 1987.1, the court may in its discretion award the amount of the reasonable expenses incurred in making or opposing the *motion*, including reasonable attorney’s fees.” (Italics added). Section 1987 subdivision (c) states: “the party or person of whom the request is made may serve written objections to the request or any part thereof, with a statement of grounds.” Neumann, the “party or person of whom the request is made,” did not make written objection to the request. Section 1987 subdivision (c) further provides: “Thereafter, upon noticed motion of the requesting party, . . . the court may order production of items to which objection was made.” The requesting party, Yaffe through her counsel Smith, did not make a noticed motion to compel. There was therefore no “motion made under subdivision (c) of Section 1987.” The statute specifically states: “[t]he procedure of this subdivision is *alternative* to the procedure provided by Section[] 1985 . . . .” (§ 1987, subd. (c), italics added). The subpoena in issue on this appeal was governed by section

1985. Mendelsohn objected under section 1985.3, and because Yaffe did not file a motion to compel, no sanctions are available under section 1987.2.

Nor was there a “motion made . . . under Section 1987.1,” the second ground for an award of sanctions under section 1987.2. Section 1987.1 provides for a “motion reasonably made by [¶] . . . [¶] a consumer described in Section 1985.3” to quash the subpoena.” Mendelsohn did not file a motion to quash.

Further, the court did not have the inherent power to impose attorney fees as sanctions; any such power must be expressly authorized by statute. (*Bauguess v. Paine* (1978) 22 Cal.3d 626, 634–640; see *Olmstead v. Arthur J. Gallagher & Co.* (2004) 32 Cal.4th 804, 809 [court’s inherent power to supervise judicial proceedings does not include power to award attorney fees as sanctions for attorney misconduct, absent specific statutory authorization or agreement of the parties].) Section 1987.2 did not authorize the trial court to award the sanctions, because Yaffe did not file a motion to compel, and Mendelsohn did not file a motion to quash.

The trial court also cited section 2023.020, which provides: “Notwithstanding the outcome of the particular *discovery motion*, the court shall impose a monetary sanction ordering that any party or attorney who fails to confer as required pay the reasonable expenses, including attorney’s fees, incurred by anyone as a result of that conduct.” (Italics added.) Again, this section did not authorize the trial court to award the sanctions because there was no “discovery motion.” (See § 2023.030 [sanctions for discovery abuses are only permissible “to the extent authorized by the chapter governing any particular discovery method or any other provision of this title”]; *Stephen Slesinger, Inc. v. Walt Disney Co.* (2007) 155 Cal.App.4th 736, 764, fn. 19 [“inherent authority to sanction for egregious misconduct does not include the power to award attorney fees to punish that misconduct”].)

We do not condone this conduct. Reluctantly, we must reverse the sanctions award as lacking in statutory authorization.<sup>3</sup>

**DISPOSITION**

The trial court's order of May 13, 2008 awarding sanctions is reversed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

MALLANO, P. J.

CHANEY,

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<sup>3</sup> Attorney conduct that is “disruptive of court process,” including abuse of the subpoena process, may be punished by contempt. (*Yarnell & Associates v. Superior Court* (1980) 106 Cal.App.3d 918, 923; *Fabricant v. Superior Court* (1980) 104 Cal.App.3d 905, 916.) When exercising its contempt powers, however, the court must act within procedural safeguards not observed in this case, and the sanctions order cannot be sustained as an exercise of the court's power to punish contempt. (*Fabricant v. Superior Court, supra*, 163 Cal.App.3d at p. 917.)